

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of	)	
	)	
NATIONAL EBS ASSOCIATION AND	)	WT Docket No. 11-22
CATHOLIC TELEVISION NETWORK	)	
	)	
Request for Extension of Time to Demonstrate	)	
Substantial Service on EBS Spectrum	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 21, 2011**

**Released: March 22, 2011**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we grant a request by the National EBS Association (“NEBSA”) and the Catholic Television Network (“CTN”) to extend the deadline for demonstrating substantial service from May 1, 2011 to November 1, 2011 for Educational Broadband Service (“EBS”) licensees. In view of the compressed timeframe for certain EBS licensees and the fact that the current deadline is near the end of the school year, we believe a six month extension is appropriate in this case.

**II. BACKGROUND**

2. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* (“*BRS/EBS R&O*”) that revamped the band plan and the rules and policies governing the licensing of the EBS and Broadband Radio Services (“BRS”) in the 2500-2690 MHz band (“2.5 GHz band”).<sup>1</sup> In that proceeding, the Commission suspended construction deadlines then applicable to licensees in the band,<sup>2</sup> and established a plan to transition EBS and BRS licensees to their new channel locations.<sup>3</sup> In 2006, the Commission replaced the suspended construction deadlines with a requirement that all BRS and EBS licensees demonstrate substantial service by May 1, 2011.<sup>4</sup> Substantial service is defined

<sup>1</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O*).

<sup>2</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6805 ¶ 200-201 (2003).

<sup>3</sup> *BRS/EBS R&O*, 19 FCC Rcd 14165, 14197-14198 ¶ 72.

<sup>4</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

as service that is “sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.”<sup>5</sup> The transition of the 2500-2690 MHz band is now nearly completed.<sup>6</sup>

3. To assist EBS licensees in demonstrating substantial service, the Commission established a safe harbor specifically for them.<sup>7</sup> In addition, the Commission established safe harbors that apply to both EBS and BRS licensees and permitted EBS licensees to meet substantial service through leasing.<sup>8</sup> Regardless of whether an EBS licensee demonstrates substantial service on its own or through leasing, however, it must meet the programming requirements in Section 27.1203 of the Commission’s Rules, and if leasing spectrum (except for leasing involving the transmission of educational programming) it must show that it is in compliance with Section 27.1214 of the Commission’s Rules.<sup>9</sup> The Commission required that both BRS and EBS licensees demonstrate substantial service for each license individually unless the license is significantly encumbered as provided in Section 27.14(o)(4) and (5) of the Commission’s Rules.<sup>10</sup>

4. On February 9, 2011, NEBSA and CTN, the primary organizations representing EBS licensees, filed a request for a six-month extension of the substantial service deadline applicable to EBS licensees, accompanied by a request for waiver of the requirement that licensees file individual construction extension requests using Form 601.<sup>11</sup> Clearwire Corporation (“Clearwire”), a BRS licensee

(...continued from previous page)

*et al.*, WT Docket No. 03-66, *et al.*, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606, 5733 ¶ 303 (2006) (*BRS/EBS 3<sup>rd</sup> MO&O*). BRS Basic Trading Area (BTA) authorizations granted after November 6, 2009 have four years from the date of grant to demonstrate substantial service and need not make any showing at this time. *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Third Report and Order*, 25 FCC Rcd 7743 (2010). 47 C.F.R. § 27.14(o).

<sup>5</sup> 47 C.F.R. § 27.14(o).

<sup>6</sup> *See* WT Docket No. 06-136.

<sup>7</sup> An EBS licensee has provided “substantial service” when:

- it is using its spectrum (or spectrum to which its educational services are shifted) to provide educational services within its GSA;
- the services it provides are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and
- the level of service it provides meets or exceeds the minimum usage requirements specified in the Commission’s rules.

*See* Guidance to Broadband Radio Service and Educational Broadband Service Licensees on Complying with Requirement to Demonstrate Substantial Service by May 1, 2011, *Public Notice*, DA 11-370 (WTB BD Feb. 25, 2011) at 2. *See* also 47 C.F.R. §§ 27.14(o)(2).

<sup>8</sup> 47 C.F.R. § 27.14(o)(1).

<sup>9</sup> *See* 47 C.F.R. §§ 27.14(o)(2)(iii), 27.14(o)(3).

<sup>10</sup> 47 C.F.R. §§ 27.14(o)(4), (5).

<sup>11</sup> Request for Waiver, National EBS Association and Catholic Television Network (filed Feb. 9, 2011) (Waiver Request) at 1 and n.5. 47 C.F.R. § 1.946(e).

and *de facto* lessee of a significant portion of EBS spectrum, supports the Waiver Request.<sup>12</sup> On February 11, 2011, the Broadband Division (“Division”) of the Wireless Telecommunications Bureau (“Bureau”) released a Public Notice seeking comment on the Waiver Request.<sup>13</sup> The Division received seventeen comments<sup>14</sup> and one reply comment.<sup>15</sup> No commenter opposed the Waiver Request.

### III. DISCUSSION

#### A. Waiver Request

5. First, we will address NEBSA and CTN’s procedural waiver request – namely, that we waive Section 1.946(e) of the Commission’s Rules, to permit the filing of one construction extension request on behalf of all EBS licensees, rather than requiring each licensee seeking an extension to file an individual FCC Form 601.<sup>16</sup> We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>17</sup>

6. We find that in view of unique factual circumstances, it would be unduly burdensome and contrary to the public interest to require EBS licensees to file individual extension requests. We are currently reaching the end of a nationwide transition of the 2.5 GHz band, affecting every EBS licensee operating in the band.<sup>18</sup> In order to demonstrate substantial service, EBS licensees have had to transition to the new band, build their systems or seek commercial operators to build systems that utilize their

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<sup>12</sup> Letter from Cathleen A. Massey, Clearwire Corporation to Marlene H. Dortch, Federal Communications Commission at 1 (dated Feb. 9, 2011).

<sup>13</sup> Wireless Telecommunications Bureau Seeks Comment on Request to Extend the Substantial Service Deadline for Educational Broadband Service Licensees to November 1, 2011, *Public Notice*, DA 11-281 (WTB/BD rel. Feb. 11, 2011)

<sup>14</sup> Cirpass LLC Comments (filed Feb. 22, 2011); Comments in Support of EBS “Substantial Service” Extension Request, Clarendon Foundation *et al.* (filed Feb. 22, 2011); Comments of Clearwire Corporation (filed Feb. 22, 2011); Supporting Comments of Daytona State College (filed Feb. 17, 2011); Comments of Hispanic Information and Telecommunications Network, Inc. (filed Feb. 22, 2011); Comments of Instructional Telecommunications Foundation, Inc. (filed Feb. 21, 2011); Supporting Comments of KSMQ Public Service Media, Inc. (filed Feb. 22, 2011); Comments in Support of EBS “Substantial Service” Extension Request, Main Street Broadband LLC (filed Feb. 22, 2011); Supporting Comments of Mid-South Public Communications Foundation (filed Feb. 22, 2011); Supporting Comments of Mississippi Ednet Institute, Inc. (filed Feb. 22, 2011); Comments in Support of EBS “Substantial Service” Extension Request, N-1 Communications, LLC (filed Feb. 22, 2011); Comments of North American Catholic Educational Programming Foundation, Inc. (filed Feb. 22, 2011); Supporting Comments of the OUTEACH Network (filed Feb. 22, 2011); Comments of Rural Operators in Support of EBS “Substantial Service” Request (filed Feb. 22, 2011); Comments of the School Board of Miami-Dade County, Florida (filed Feb. 17, 2011); Thrun Law Firm, P.C. Comments (filed Feb. 18, 2011); Supporting Comments of University of Maryland Eastern Shore and Salisbury University (filed Feb. 22, 2011).

<sup>15</sup> Fluvanna County Public Schools Reply Comments (filed Mar. 1, 2011).

<sup>16</sup> Waiver Request at 4. 47 C.F.R. § 1.946(e).

<sup>17</sup> 47 C.F.R. § 1.925(b)(3).

<sup>18</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14197 ¶ 72. 47 C.F.R. § 27.1230.

spectrum, and incorporate the new technology into their educational program.<sup>19</sup> Because EBS licensees all face the same challenges and the same deadline for demonstrating substantial service, they are similarly situated, so requiring them each to file individual extension requests would be repetitive. Moreover, it would be unduly burdensome to require EBS licensees to devote scarce resources to the preparation and submission of individual construction extension requests so close to the end of the school year. Therefore, we grant NEBSA's and CTN's request for waiver of the individual filing requirement in Section 1.946(a), and permit this extension request to be filed on behalf of every EBS licensee.

#### **B. Extension request**

7. We now turn to NEBSA and CTN's request, on behalf of all EBS licensees, for a six month extension of time in which to demonstrate substantial service. Section 1.946(e) of the Commission's rules permits an extension of time to demonstrate substantial service if the request for extension is filed before the expiration of the construction period and if the licensee shows that a failure to meet the construction deadline is due to causes beyond its control.<sup>20</sup> The rule provides that extension requests will not be granted for delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner.<sup>21</sup> Absent an extension, under Section 1.946(c), EBS licensees that do not provide substantial service on or before May 1, 2011 will have their respective licenses automatically terminated on the date the construction period expires.<sup>22</sup>

8. Finding that NEBSA and CTN have met the requirements of Section 1.946(e), we conclude it to be in the public interest to grant EBS licensees a six-month extension of time, until November 1, 2011, to provide substantial service, particularly in view of the proximity of the current May 1, 2011 deadline to the end of the school year.<sup>23</sup> As noted above, EBS licensees are uniquely situated when it comes to demonstrating substantial service, because they must show that they meet EBS-specific educational programming requirements.<sup>24</sup> Even if an EBS licensee's system is constructed and operational, if it cannot meet these educational use requirements, under Section 27.14(o) it must forfeit its license and is ineligible to regain it. There is evidence in the record that because the substantial service deadline is so close to the end of the school year, a significant number of EBS licensees may be unable to comply with the educational use requirements by May 1, 2011. In some instances, a commercial operator has built out a licensee's educational network, but the licensee cannot incorporate the use of wireless broadband services into its curriculum before May 1, 2011.<sup>25</sup> In other cases, the commercial operator has met the coverage requirements of Section 27.14(o)(1)(ii) for the EBS licensee's Geographic Service Area ("GSA"), but has not yet built the licensee's educational network.<sup>26</sup> In still other cases, the commercial

<sup>19</sup> Waiver Request at 2-4; Comments of North American Catholic Educational Programming Foundation, Inc. at 3-4 (takes time for educational uses of new technology to be adopted by schools as we have seen this pattern both in urban and rural areas).

<sup>20</sup> 47 C.F.R. § 1.946(e)(1).

<sup>21</sup> 47 C.F.R. § 1.946(e)(2).

<sup>22</sup> 47 C.F.R. § 1.946(c). *See also* 47 C.F.R. § 27.14(o), which states that any licensee that fails to demonstrate substantial service by May 1, 2011 will forfeit its license and will be ineligible to regain it.

<sup>23</sup> While EBS licensees will have to be providing substantial service by November 1, 2011, the deadline for filing a notification with the Commission will be November 16, 2011. *See* 47 C.F.R. § 1.946(d) ("The notification must be filed within 15 days of the expiration of the applicable construction or coverage period.")

<sup>24</sup> 47 C.F.R. §§ 27.1203, 27.1214.

<sup>25</sup> Waiver Request at 4.

<sup>26</sup> Clearwire Comments at 4.

operator is building the EBS licensee's educational network so that the EBS licensee can meet the requirements of Section 27.14(o)(2) of the rules, even though it has not deployed commercial service in the licensee's GSA.<sup>27</sup> These licensees also may not be able to meet the educational use requirement by the May 1, 2011 deadline.

9. We find that EBS licensees and their commercial partners have been diligent in taking the actions necessary to provide service using the 2.5 GHz band. Initially, a large amount of work had to be done to transition the 2.5 GHz band to the new band plan. The transition process started in July 2006, after the Commission modified its transition rules.<sup>28</sup> Between them, Clearwire and Sprint Corporation have acted as proponents to transition over 2,000 BRS and EBS licenses in over 400 Basic Trading Areas ("BTAs").<sup>29</sup> We agree with Daytona State College's observation that while some BTAs transitioned easily and early, others did not.<sup>30</sup> Thus, in some areas of the country, the five year build-out period was squeezed into a year or two or even less.<sup>31</sup>

10. After the transition was completed, EBS licensees, or, in many cases, their commercial partners, began to deploy service. Clearwire, the largest commercial operator in the 2.5 GHz band, reports that at the end of 2010, its 4G mobile broadband service covered an estimated 119 million people in 71 markets; one-half of the spectrum used in Clearwire's commercial network is leased from EBS licensees.<sup>32</sup> Digital Bridge Communications, Xanadoo, and Nextwave have also launched commercial operations and Sprint, Comcast and Time Warner use Clearwire's network to provide their own 4G services.<sup>33</sup> In addition, several EBS licensees, including Northern Michigan University, have used EBS spectrum to construct wireless broadband systems for educational use.<sup>34</sup> However, service providers report that deployment of service has been hampered, particularly in smaller markets, by lack of

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<sup>27</sup> Clearwire Comments at 4.

<sup>28</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606, 5641 ¶¶ 64-65 (2006) (*BRS/EBS 3<sup>rd</sup> MO&O*). The first transition initiation plans were filed by Clearwire on July 19, 2006. See WT Docket No. 06-136.

<sup>29</sup> See WT Docket No. 06-136.

<sup>30</sup> Supporting Comments of Daytona State College at 2.

<sup>31</sup> *Id.* Some areas of the country have not yet transitioned. Those areas will be making their showings using operations under the old band plan.

<sup>32</sup> Clearwire Comments at 2-3.

<sup>33</sup> *Id.*

<sup>34</sup> See <http://webb.nmu.edu/SiteSections/WiMAX.shtml>.

equipment and engineering expertise,<sup>35</sup> lack of full 4G signal availability,<sup>36</sup> difficulties in obtaining middle-mile and backhaul facilities,<sup>37</sup> and permitting delays that have slowed cell siting efforts.<sup>38</sup>

11. Based on this record, we conclude that EBS licensees and their commercial partners have acted diligently to provide service in this band, and that the need to extend the May 1 substantial service deadline is due to causes beyond the control of the licensees.<sup>39</sup> The May 1 deadline falls too close to the end of the school year to give many EBS licensees a meaningful opportunity to integrate newly constructed systems into their educational missions. In order to provide educators additional time to comply with the educational use requirements and to incorporate the use of wireless broadband into their curricula, we find that a six month extension of the substantial service deadline for EBS licensees is appropriate.

12. Moreover, we conclude that the underlying purpose the Commission's performance requirements rules would not be served by strictly enforcing the May 1, 2011 substantial service deadline with respect to EBS licensees. In general, performance requirements are designed to "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services."<sup>40</sup> With respect to EBS, the performance requirements are also intended to "promote the availability of broadband to all Americans, including broadband technologies for educators."<sup>41</sup> As mentioned above, in many cases, either because the commercial licensee has not yet built the licensee's educational system or built it too late in the school year, an EBS licensee can meet the coverage requirements of Section 27.14(o)(1)(ii) but cannot meet the educational use requirements of Section 27.1214 of the rules. In these cases, the spectrum is being used, not warehoused, and thus, the purpose of Section 27.14(o) would be frustrated if these licenses were to be cancelled. Finally, since the record shows that most of the problems are occurring in the smaller markets, we find that enforcing the May 1, 2011 deadline would, in some instances, frustrate the underlying purpose of the rules to ensure prompt delivery of broadband services to rural areas. For these reasons, we find it to be in the public interest to grant to EBS licensees the brief extension of the substantial service deadline that NEBSA and CTN request.

#### IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons discussed above, we waive the requirements for licensees to individually file extension requests. We also extend the deadline for all EBS licensees to demonstrate substantial service to November 1, 2011.

14. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 1.946(e) of the Commission's Rules, 47 C.F.R. §§ 1.925 and 1.946(e) that the Request for Waivers and Extensions of Time to Construct filed by the National EBS Association and the Catholic Television Network on February 9, 2011 IS GRANTED.

<sup>35</sup> Supporting Comments of Daytona State College at 1.

<sup>36</sup> Supporting Comments of Mid-South Public Communications Foundation at 1-2.

<sup>37</sup> Clearwire Comments at 4-5 and n.8.

<sup>38</sup> Clearwire Comments at 5.

<sup>39</sup> See 47 C.F.R. § 1.946(e)(1).

<sup>40</sup> See *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5720 ¶ 278, quoting 47 U.S.C. § 309(j)(4)(B).

<sup>41</sup> *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5720 ¶ 278.

15. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946(e) of the Commission's Rules, 47 C.F.R. § 1.946(e), that the licensing staff of the Broadband Division SHALL UPDATE the Universal Licensing System to change the deadline for Educational Broadband Service licensees to demonstrate substantial service to November 1, 2011.

16. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman  
Chief, Wireless Telecommunications Bureau